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No. 86-929

Supreme Court, U.S.
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JOSEPH P. SPANOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALPHONSE DELLA-DONNA,
Petitioner,

---against---

GORE NEWSPAPERS COMPANY AND
HAMILTON C. FORMAN,
Defendants,

GORE NEWSPAPERS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEALS OF THE STATE
OF FLORIDA, FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RAY FERRERO, JR.*

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January 9, 1987

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QUESTION PRESENTED FOR REVIEW

The four questions presented by Petitioner for review by this Court can be restated as one question:

Did the Florida courts apply the correct criteria in determining that petitioner was a limited public figure within the scope of an identifiable public controversy?

RULE 28.1 LIST

Gore Newspapers is a subsidiary of the Tribune Co.*

List of Tribune Company's Subsidiaries

Chicago National League Ball Club, Inc.

Cubs Care

Tribune Company Overseas Finance N.V.

Tribune National Marketing Company

News Building, Inc.

NEWSPAPERS COMPANIES

Chicago Tribune Company

Chicago Relay Service Association

Chicago Tribune Charities, Inc.

Chicago Tribune Foundation

Chicago Tribune Newspapers, Inc.

Chicago Tribune Press Service, Inc.

Newspaper Readers Agency, Inc.

Penny Saver Publications, Inc.

Tribune Media Services, Inc.

New York News Inc.

Daily News Charities, Inc.

Daily News Foundation, Inc.

News and Sun-Sentinel Company

Gold Coast Publications, Inc.

*(The corporate name for Gore Newspapers was changed to News and Sun-Sentinel Company after the initiation of this lawsuit).

III

Sentinel Communications Company

Sentinel Communications Charities, Inc.

Sentinel Printing Company

Tribune Newspapers West, Inc.

Daily News Foundation

Sunbelt Publishing Company

Tulsa Trading News, Inc.

Greensheet Publications, Inc.

News Press Company

The Daily Press, Incorporated

Hampton Roads Newspapers, Inc.

RADIO & TV COMPANIES

Tribune Broadcasting Company

Tribune Entertainment Company

WGN Continental Broadcasting Company

WGN of California, Inc.

WGN of Colorado, Inc.

WGNO Inc.

WPIX, Inc.

Connecticut Broadcasting Company

WGNX Inc.

KTLA, Inc.

GWB Productions

CABLE TV COMPANIES

Tribune Cable Communications, Inc. and Subsidiaries

IV

Hampton Roads Cablevision Company*

Danville Cablevision Company*

NEWSPRINT/FOREST PRODUCTS COMPANIES

The Ontario Paper Company Limited

Marlhill Mines Limited

Ontario Paper Company Foundation

Q.N.S. Paper Company Limited

Baie Comeau Company

Manicouagan Power Company

Ontario Paper Sales Europe Limited

CORPORATE JOINT VENTURES

United Tribune Paging Corporation

Comeau Company Limited

Ontario Paper Recycling Inc.

JOINT VENTURES - PARTNERSHIPS

Knight News Wire

Tower Productions

220 East Limited Partnership

Scierie des Outardes Eng.

Tribune/Central City Productions

TV Network

AP News Plus & AP News Cable

*Owned by The Daily Press, Incorporated

TABLE OF CONTENTS

Question Presented for Review	I
Rule 28.1 List	II
Table of Authorities	v
Statement of the Case	1
Reasons for Denying the Writ	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. Liberty Lobby</i> , 106 S.Ct. 2505 (1986)	8
<i>Dameron v. Washington Magazine</i> , 779 F.2d 736 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 2247 (1986)	8
<i>Gertz v. Robert Welch</i> , 418 U.S. 323 (1974)	6, 7
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979)	7, 8
<i>Marcone v. Penthouse</i> , 754 F.2d 1072 (3d Cir. 1985), cert. denied, 106 S.Ct. 182 (1985)	6
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976)	8
<i>Waldbaum v. Fairchild Publications</i> , 627 F.2d 1287 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980)	7, 8
<i>Wolston v. Reader's Digest Ass'n, Inc.</i> , 443 U.S. 157 (1979)	8



STATEMENT OF THE CASE

The petitioner has proffered a Statement of the Case which is replete with factual misstatements, distortions and inaccuracies. We, therefore, restate:

Nova University in Fort Lauderdale, Florida, was, at the time of the alleged defamations, the only university in the community. Nova was given a multi-million dollar donation so it could continue to exist. Without warning, the gift and the University's existence were threatened by the actions of one man—the petitioner.

From the moment of the gift's designation to the time of delivery, the petitioner acted as a spokesman and, in his individual capacity, undertook certain voluntary and purposeful public actions which established himself as the lead player in the ensuing public controversy over his decision to rescind the gift to the University.¹

In May, 1976, the petitioner publicly announced the gift to Nova University.² He informed the University that there were to be no restrictions placed on its use.³ In

1. The district court summarized the petitioner's role as follows:

"This is not, however, one of those rare cases where the Plaintiff became a limited public figure involuntarily. On the contrary, Della-Donna initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role." (Appendix to Petition at 11a).

2. The announcement by Mr. Della-Donna of the Goodwin gift was covered by Gore in a series of articles which ran on May 20, 21, 28 and June 24, 1976.

3. The pertinent text of the letter to Nova University states: "This gift is in the memory of Leo Goodwin, Sr., for the use of University exclusively to further its educational functions, to be expended or added to endowment as determined by the University Board. *Except for the requirement that the property be used for University's educational program, there are no restrictions whatsoever with respect to the use of these funds.*" [emphasis supplied]

early 1978, the petitioner unilaterally decided to rescind the donation.

The petitioner asks this Court to believe that the gift was restricted by the Grantor to local institutions which were locally controlled. (Petition at pages 4 & 5). He then asserts that upon discovering that the University was not locally controlled, his fiduciary duties required the rescission of the gift. (Petition at pages 4 & 5). The true facts, reflected by the trust document itself are that local control had nothing to do with the Grantor's intent,⁴ but was the justification the petitioner chose for his decision to rescind the gift.

The petitioner, in his Statement of the Case, merely becomes "one of three trustees for the Foundation"; however, the record shows numerous statements and actions by the petitioner which demonstrate that he alone selected who the trust funds would go to, that he made the decision to rescind, and that *he intended to use the press as a forum for his views*. As petitioner testified at his deposition:

"Yes. We met at the University, and I told them that I'm very disturbed about this, *because when I selected this University . . .*

I said one is I close my eyes to the whole situation and give them the money. That I could not live with that, even if I force them to put in the paper that Nova is controlled by New York." [emphasis supplied]

. . .

4. The Leo Goodwin, Sr., Unitrust states at 3(b), "I desire, but do not require, that this charitable organization be either a school of higher learning in business or medicine, or a hospital." There is no mention at all in the trust document of an intent to benefit a *locally controlled* institution.

The American Bar Association also viewed the petitioner as the key figure in the gift controversy in its reinspection report concerning the Nova Law Center:

*"Mr. Della-Donna was sympathetic to the needs of the law school and indicated he would approve the distribution of Unitrust assets for the law building . . ."*⁵
[emphasis supplied]

The petitioner was not just one of the Foundation Trustees who helped select the University and who joined in a consensus decision to rescind the gift. By his own words, he selected the University and he alone decided when and how the University would get the funds.

The Allegedly Libelous Articles in Context

Respondent published 78 articles between May 20, 1976, and October 17, 1979,⁶ which covered the announcement of the Goodwin gift, the subsequent controversy over rescission and the controversy's eventual settlement.⁷

5. The petitioner met with the American Bar Association without any representatives from the University or other Foundation Trustees present.

6. Many were in-depth investigative pieces; some were entirely based on interviews with Mr. Della-Donna. Some reported allegations made by both sides in court documents. (On April 25, 1978, the date Della-Donna threatened to begin proceedings to rescind the gift, the Nova Board of Trustees petitioned the Broward County Circuit Court for release of the Goodwin funds. On May 4, 1978, Della-Donna filed a Complaint for Declaratory Relief on behalf of the Estate of Leo Goodwin, charging Nova University with intentionally and systematically covering up an affiliation with the New York Institute of Technology and with "fraudulent misrepresentation.") Gore published an editorial on May 3, 1978, which clearly supported Mr. Della-Donna, entitled "Local Control of Nova University Must Be Restored."

7. The litigation ended when Della-Donna agreed to settle for one million dollars of Nova's proceeds from the gift for his fees and expenses. There was no change in the composition of Nova's Board of Trustees.

The petitioner claims he was libeled in six of these articles and in one letter to the Editor. However, it was not until May 6, 1978, that the first of the allegedly libelous articles appeared.⁸ By then, the public controversy was raging: charges of fraud had been leveled against the University and its trustees by the petitioner, trustees had threatened to resign, and prominent Broward County citizens other than the petitioner and the University Board had become involved. One Trustee countered with widely disseminated charges of his own with respect to Della-Donna's role in the controversy,⁹ which Della-Donna refuted in an

8. Della-Donna states incorrectly in his Petition (at page 5), that from May 6, 1978, "he essentially stopped answering questions from the press . . ." The primary reporter testified that Della-Donna was readily available for telephone conferences until "after the matter ended in court. . ." This event occurred in late July, 1978, when the Broward Circuit Court, ruled in Nova's favor and ordered that \$6.5 Million be turned over within 90 days.

Further, Della-Donna spoke with the same reporter at length about his proposal to the Fort Lauderdale Downtown Development Authority that Nova Law Center be located downtown, in late July, 1978.

Della-Donna also states incorrectly that he never "circulated any materials to the media." (Petition at page 8). The circuit court noted in its order, however, that on May 3, 1978, Della-Donna "made available to the defendant, Gore, a four-page document and a memorandum dated March 27, 1978, containing two options he had presented to Nova." (Appendix to Petition at 14a).

9. "I am even more distressed by the content and tone of Mr. Della-Donna's 'confidential' letter to President Fischler which has since been distributed to all the Nova Trustees. Any letter distributed so widely can hardly be considered to be confidential. I take, as a public affront, the implication that the trustees and Chancellor of Nova have concealed from Mr. Della-Donna the 'affiliation' and/or 'federation' with the New York Institute of Technology. The charge that we have been guilty of fraudulent misrepresentation is one which is going to be met publicly since I am of the opinion that the charge against us has already become a matter of public discussion."

(Continued on following page)

article published on May 6, 1978.¹⁰ All used the newspaper as a forum for their views.¹¹ In short, the future of the only university¹² in Broward County, its faculty and its students had been placed in jeopardy by the Petitioner's independent actions taken subsequent to the unrestricted gift designation to Nova.

The Nexus Between the Alleged Defamations and the Controversy

The alleged defamations all concern the petitioner's myriad positions relating to the Goodwin interests,¹³ and the impact those positions had upon the distribution of the trust funds. *None* of the alleged defamations had any-

Footnote continued—

"My response to Mr. Della-Donna's malicious charges is *cui bono*. Whose interests have been served and will continue to be served by continued litigation? No trustee of Nova University has benefited personally from Nova University. The flow of funds, it must be remembered, has been from NYIT to Nova, not the other way around. On the other hand, I have been advised that the billings of Mr. Della-Donna and his associates as of this date are in excess of \$900,000."

10. "In response to Salten's contention that he and his associates have submitted more than \$900,000 in billings, Della-Donna said his law firm has never billed the university and has received just a fraction of that amount from the Unitrust."

"If they're accusing us of receiving that (\$900,000) from Unitrust, well, that's absolutely false, the attorney said."

11. As another example, in an article published May 1, 1978, a former mayor of Fort Lauderdale and Nova Trustee raised the specter of Nova's collapse as a result of the attempted gift rescission.

12. In 1976, Nova University was the only undergraduate and graduate degree-granting institution in Broward County.

13. Mr. Della-Donna was Leo Goodwin, Sr.'s, accountant and attorney. He prepared Goodwin's estate, drafted the Unitrust document and litigated its validity. He served as Goodwin's Personal Representative and as a Trustee for the Goodwin Foundation. His law firm presently represents the Goodwin estate, the Unitrust and the Goodwin Foundation.

thing to do with his life apart from his various positions with the Goodwin family, none ever mentioned his private affairs or anything even remotely connected to it. Rather, the newspaper only reported charges made by others, which were in essence responses to allegations (of fraud and misrepresentation on the part of Nova) made by Della-Donna that had been published by the newspaper.¹⁴

REASONS FOR DENYING THE WRIT

The Florida Courts correctly applied the principles of this Court as articulated in Gertz v. Welch and its progeny and have struck the proper constitutional balance in determining that Della-Donna was a limited public figure within the context of the specific facts presented.

The Petition presents no conflicts among the decided cases, and there is no other reason for this Court to concern itself with this case.

This case is a classic example of a state court¹⁵ following Constitutional and Supreme Court guidelines which are, of necessity, "broad rules of general application." *Gertz v. Robert Welch*, 418 U.S. 323 (1974). One of those broad rules, as noted in *Gertz*, is especially pertinent here:

14. The alleged defamations, as summarized by the District Court in its opinion:

"The first six [articles] essentially involve reporting the charges made by Nova in court documents that Della-Donna had improperly charged the estate over One Million Dollars in fees." (Appendix A, Petition).

15. "Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action." *Marcone v. Penthouse*, 754 F.2d 1072 (3d Cir. 1985), cert. denied, 106 S.Ct. 182 (1985).

"The first remedy of any victim of defamation is self-help, using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation."

The petitioner repeatedly used the newspaper as a forum for his views.¹⁶ The majority of the 78 published articles either quote the petitioner or recount his position on the controversy.¹⁷

Further, as the petitioner acknowledged, himself, he has suffered no damage to his reputation as a result of the alleged defamations.¹⁸

The cases cited by petitioner, rather than demonstrating conflict, show that the lower courts are applying the broad rules enunciated in *Gertz*, as refined in subsequent cases, to particular factual situations. The decision below rests upon its own peculiar facts and was correctly decided by the Florida courts.

16. Della-Donna had the type of access which this Court has defined as "one of the accouterments of having become a public figure" that is, "regular and continued access to the media." *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

17. The extent of the press coverage, although not determinative, is a relevant factor in determining whether a public controversy is involved. *Waldbaum*, 627 F.2d at 1297. The controversy was also covered by the Fort Myers/Florida News Press, Palm Beach Times, Winter Haven/News Chief, Sarasota Journal, Ocala Star-Banner, Lakeland Ledger, Miami Herald, and New York Law Journal.

18. In deposition testimony, Mr. Della-Donna acknowledged that he has not lost a single client since the articles appeared nor has he identified any potential clients he may have lost. He also noted that he was elected Treasurer of the Coral Ridge Yacht Club during the period when the alleged defamations were published; a position of trust such as this would hardly be given to a man whose reputation had been adversely affected.

Plaintiff also acknowledges being elected to the Knights of Malta after the alleged defamations appeared. The society admits only those who have contributed to the furtherance of Catholic charitable endeavors, and each member must be of the highest ethical character.

The Florida appellate court adopted the oft cited and well respected criteria for determination of a public controversy and limited public figure status found in *Waldbaum v. Fairchild Publications*, 627 F.2d 1287 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980).¹⁹

In fact, *Waldbaum* itself relied upon this Court's specific directions in articulating its criteria for determining limited public figure status. See, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).²⁰

Most importantly, this Court, in *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2509, fn.3 (1986), approved the use of the *Waldbaum* criteria for determination of limited public figure status.

This is not a case of a reluctant participant in an essentially private matter being dragged into the public limelight. The Petitioner courted the public limelight by making himself available to the press and presenting his views to the public at large through its medium. He intended to use the press as a forum for his views by his own admission.²¹ It was only when the judicial system

19. The district court first determined that . . . "appellant and Nova University became *embroiled* in a dispute regarding the control of the University." (Appendix to Petition at 2a) [emphasis supplied]. The district court, using the standards articulated in *Waldbaum*, then stated, "applying this test to the instant case, the dispute involved in the instant case constituted a public controversy." (Appendix to Petition at 10a).

20. This Court has recently denied certiorari in another case that relied upon the *Waldbaum* standards. *Dameron v. Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 2247 (1986).

21. See page 2, *supra*, where he stated that one of his options was to force the University to put it in the newspaper that they were controlled by New York.

ordered that he relinquish the gift, that he offered "no comment."²²

Mr. Della-Donna was not a trivial or tangential participant in the controversy. On the contrary, as held by the district court, he:

"initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role."²³

CONCLUSION

Based upon the foregoing reasons, Respondent respectfully asks this Court to deny certiorari.

Respectfully submitted,

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22. The primary reporter testified that even after Della-Donna became unavailable for comment, "In each and every story in which Mr. Della-Donna was involved, I would make at least two efforts to contact him."

The reporter further testified that throughout the entire period when the alleged defamations were published, Mr. Della-Donna never complained to him about any of the articles or pointed out that there were any inaccuracies.

23. Appendix to Petition at 11a.